

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARRY L. WICKS

Claimant

VS.

HAWKER BEECHCRAFT CORPORATION

Self-Insured Respondent

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Docket No. 1,036,016

ORDER

Claimant appeals the November 25, 2008, preliminary hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied medical treatment for his neck and facial complaints after the ALJ determined that claimant had failed to establish that he is in need of additional treatment as a result of the December 15, 2004, work accident to his left shoulder.

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent appeared by its attorney, Clifford K. Stubbs of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 2, 2008, with attachments; and the documents filed of record in this matter.

ISSUE

Did the ALJ err in denying claimant medical treatment for his neck/facial problems, which claimant contends are a direct result of the injury to claimant's left shoulder?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant had worked for respondent as a spray painter for almost 35 years, when, on December 15, 2004, he suffered an injury to his left shoulder while helping his co-workers lift materials out of a large box. Claimant experienced a sudden pain in his left shoulder as they were lifting. The pain gradually worsened, and claimant went to the dispensary where he was treated with ice and heat packs, none of which helped. Claimant was ultimately referred to Pat Do, M.D., for an examination. Claimant was diagnosed with rotator cuff syndrome with a possible rotator cuff tear. Surgery, consisting of left shoulder debridement of the labrum, subacromial decompression and a mini-open rotator cuff repair, was performed by Dr. Do on August 1, 2005. The surgery provided claimant with some improvement, and he continued under the care of Dr. Do for several months. Claimant returned to his regular duties approximately one week after the surgery with lifting restrictions, but this did not affect his ability to use a spray gun.

Claimant testified at the preliminary hearing that prior to the surgery, he suffered from pain in his left shoulder, neck, chest and shoulder blade. However, the medical records of Dr. Do contain only left shoulder complaints. On cross-examination, claimant stated the symptoms while he was being treated by Dr. Do were into the back, in the area of his shoulder blade and from the top of the shoulder to the edge of the shoulder. Claimant continued to have complaints in the shoulder. An MRI, done in February 2006, was negative for acute tear or recurrent tear. But claimant's examination on March 30, 2006, was positive for impingement. Claimant was considered to be at maximum medical improvement (MMI) at the time of the March 30, 2006, examination and was released from Dr. Do's care. Claimant continued to have problems and sought additional medical treatment.

Claimant ultimately came under the care of Larry F. Frevert, M.D., of Rockhill Orthopaedics, P.C., with the first examination on March 9, 2007. Claimant was examined for left shoulder pain, with Dr. Frevert diagnosing a possible left shoulder recurrent rotator cuff tear. There is an indication in the medical notes from that date that claimant was experiencing numbness into the side of his face. An MRI/arthrogram was recommended as an MRI cannot distinguish well between scar tissue and a tear.¹ The MRI/arthrogram did not show an obvious tear, but did display AC joint arthrosis and fluid. Dr. Frevert stated that surgery to remove claimant's distal clavicle might cure claimant of most of the pain and problems. Surgery by Dr. Frevert was performed on May 3, 2007, with the distal clavicle being seen as quite degenerative. The surgery provided some relief, and claimant was referred for physical therapy for the shoulder. By September 2007, claimant's left shoulder displayed nearly full range of motion, but the strength was still limited. Claimant continued with the restrictions from the August 16, 2007, evaluation. He was cautioned to do no overhead activities at work. During the September 13, 2007, examination, there was discussion regarding burning and stiffness above the shoulder, which Dr. Frevert indicated may be partially related to a strength problem and partially from claimant's neck. This

¹ P.H. Trans., Resp. Ex. B (March 9, 2007, office notes of Dr. Frevert).

is the first time neck problems are mentioned in any medical records. During the November 16, 2007, examination, the doctor noted burning in claimant's shoulder. Dr. Frevert was unable to identify the source of the burning. The report does indicate an automobile accident which Dr. Frevert indicated had no effect on claimant's shoulder, as claimant's "current symptoms" existed before the accident. As of April 29, 2008, claimant was back to work and Dr. Frevert was pleased with his progress. Claimant had muscle aches and pains which Dr. Frevert felt should get better as claimant's strength and endurance improve. Claimant had ongoing neck complaints which Dr. Frevert wanted to treat with epidurals. Claimant's job requires a lot of extension of his neck with overhead activities. Dr. Frevert thought claimant's work activity was irritating claimant's neck.² Claimant was released from Dr. Frevert's care at that time, with a caution to not work over 40 hours per week at his regular job.

In September 2007, claimant developed an infection in his shoulder at the incision site. He came under the care of Charles H. Bossemeyer, II, M.D., on September 21, 2007. Claimant was treated with antibiotics. By October 3, 2007, claimant's infection was improved, but claimant continued to have problems in the incision. Dr. Bossemeyer identified a granuloma, which was to be removed by claimant's orthopedic surgeon. There is no mention in the medical reports of Dr. Bossemeyer of neck or face problems.

Claimant was referred to registered physical therapist David Sanderson for physical therapy. Only part of Mr. Sanderson's therapy notes are in this record. The first note is dated October 3, 2007, and discusses claimant's ongoing treatment and his recent examination by Dr. Kossow. The second note of October 11, 2007, discusses claimant's shoulder pain and describes recent left neck pain, left facial pain and a headache localized in claimant's left orbital region. The note also discusses neck pain and headaches during the October 5, 2007, physical therapy visit. The note states that, since that time, claimant has been unable to perform at the level he did on October 4, 2007. The October 18, 2007, physical therapy note indicates that claimant has been treated 65 times. Claimant describes left shoulder and neck pain at a 3/10 level. Claimant described a headache which he attributes to the heavier lifting done the day before in work conditioning. Lifting above 35 to 40 pounds from the floor to claimant's waist and over 15 pounds overhead caused increased neck pain and headaches on claimant's left side.

The physical therapist contacted respondent's plant nurse, Bev Walker, about claimant's increased problems with the more strenuous activities. Claimant was then referred to William D. Kossow, M.D., for an evaluation on October 2, 2007. Dr. Kossow's report indicates that, about a month after the surgery by Dr. Do, claimant began having neck pain with radiating pain into claimant's left upper chest, left upper back and shoulder and into the arm with occasional numbness and tingling. Headaches and facial numbness also occurred on occasion. Claimant was found to be tender over his left shoulder and

² P.H. Trans., Resp. Ex. B (April 29, 2008, office note of Dr. Frevert).

neck region. His strength and sensation in his bilateral upper extremities was found to be normal and his neck range of motion was normal without pain. There was slight weakness and some pain in the left shoulder with external rotation. Dr. Kossow diagnosed claimant with neck pain from myofascial pain secondary to 2 years of shoulder dysfunction and secondary biomechanical changes from overuse of the neck, upper back and shoulder muscles. Dr. Kossow recommended claimant undergo additional physical therapy for the neck and shoulder. Then an MRI of the cervical spine and an EMG of the left upper extremity should be used to rule out cervical radiculopathy or brachial plexopathy. Finally, trigger point injections could be used if no neurological cause is found. Claimant was willing to undergo the treatment regimen recommended by Dr. Kossow.

Claimant was referred to Terrence Pratt, M.D., of Rockhill Orthopaedics, P.C. Dr. Pratt first examined claimant on November 28, 2007. Claimant presented complaints of tingling and burning across the shoulder into the elbow and left cervical region and behind the left eye with a headache. Dr. Pratt diagnosed cervicothoracic syndrome with myofascial component. Claimant was diagnosed with myofascial component, which was treated with trigger point injections, which provided only temporary relief. An MRI of the cervical spine was performed, revealing degenerative spurring with degenerative disc disease and neural foramina narrowing at C3 through C6. Dr. Pratt was unable to state that claimant's cervical findings are causing claimant's shoulder pain.

Due to the conflict with the medical opinions, the ALJ determined that a referral to board certified neurological surgeon Paul S. Stein, M.D., was appropriate. Dr. Stein examined claimant on October 30, 2008. Dr. Stein was provided medical reports from Dr. Do, Dr. Frevert, Southwind Physical Therapy, Dr. Bossemeyer, Dr. Kossow and Dr. Pratt. Dr. Stein found claimant to have moderate atrophy of disuse around the left shoulder and claimant's cervical range of motion was mildly decreased. Dr. Stein found claimant to be post two surgeries to his left shoulder from his reported work injury. He noted that claimant began complaining of left-sided neck pain, left periorbital headaches and left-sided facial numbness in October 2007. Dr. Stein was unable to state, within a reasonable degree of medical probability and certainty, that there is a causal relationship between claimant's symptoms and the December 15, 2004, injury. The ALJ, after reviewing the IME report of Dr. Stein, found that claimant had failed to establish a connection between his current need for treatment for his neck and facial numbness and the accident of December 15, 2004.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

³ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁶

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁷

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁸

Claimant's contention that he had neck and back problems from almost immediately after the accident in this matter is not supported by this record. The medical notes from Dr. Do's long period of treatment contain no mention of neck, back or chest complaints.

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁸ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

The notes of Dr. Frevert from his first examination do note numbness in claimant's face, and the September 2007 notes indicate neck complaints, but any evidence supporting an injury to those areas from the December 15, 2004, accident is unconvincing to this Board Member.

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁹

However, what is convincing is the information contained in the physical therapy notes, including left neck pain, left facial pain and headaches, all associated with the physical stress of the physical therapy which was intended to aid claimant in his healing process from the surgery of Dr. Frevert. In fact, the notes of October 11, 2007, pinpoint the physical therapy activities of October 5, 2007, as acting to prevent claimant from being able to perform at the level he did only the day before, on October 4, 2007. Up to that point, claimant was "making progress".¹⁰ Injuries suffered while on the way to or returning from authorized medical treatment are compensable in Kansas.¹¹ Additionally, injuries suffered from the effects of authorized medical treatment are also compensable in Kansas.¹² The decision to deny claimant medical treatment for his neck and facial complaints should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered injuries to his neck and back on December 15, 2004, when he injured his left shoulder. However, claimant has shown that his neck and face problems for which he currently needs medical treatment stem, at least

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹⁰ P.H. Trans., Resp. Ex. D (October 11, 2007, physical therapy note).

¹¹ *Taylor v. Centex Construction Co.*, 191 Kan. 130, 379 P.2d 217 (1963).

¹² *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

¹³ K.S.A. 44-534a.

in part, from the physical therapy treatment being provided as a result of the left shoulder surgery performed by Dr. Frevert. Therefore, the decision by the ALJ to deny medical treatment to claimant for those complaints is reversed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 25, 2008, should be, and is hereby, reversed and remanded to the Administrative Law Judge for an order consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

HONORABLE GARY M. KORTE

c: John M. Ostrowski, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge